

Delaware Court of Chancery rules on common law fraud claim following acquisition

August 24 2016 | Contributed by [Ropes & Gray LLP](#)

In *FdG Logistics LLC v A&R Logistics Holdings, Inc* the Delaware Court of Chancery held that a seller's explicit disclaimer of extra-contractual representations in a merger agreement would not bar a buyer's claim of reliance on fraudulent extra-contractual representations.

The common law fraud claim in *FdG Logistics* arose from the 2012 acquisition of FdG Logistics by a private equity firm through its holding company, A&R Logistics. Specifically, A&R alleged that FdG engaged in an extensive series of illegal activities that were concealed during pre-merger due diligence and that FdG's selling stockholders had committed fraud due to alleged misrepresentations and omissions in a confidential information memorandum and management presentation provided to A&R. The selling stockholders moved to dismiss A&R's fraud claim because of the merger agreement's exclusive representation clause, which included a disclaimer by the selling stockholders of any extra-contractual representations and a customary integration clause which stated that the merger agreement superseded any other understandings, agreements or representation between the parties.

Despite the merger agreement's inclusion of an exclusive representation and integration clause, the court denied the selling stockholders' motion to dismiss due to the absence of an affirmative disclaimer of reliance on extra-contractual representations by A&R which would have precluded it from asserting a fraud claim based on extra-contractual representations. The court affirmed then-Vice Chancellor Strine's principle in *Abry Partners VLP v F & W Acquisition LLC* (Del Ch 2006) that "the court will not insulate a party from liability for its counterparty's reliance on fraudulent statements made outside of an agreement absent a clear statement by that counterparty—that is, the one who is seeking to rely on extra-contractual statements—disclaiming that reliance". The court also distinguished the case from its recent decision in *Prairie Capital II, LP v Double E Holding Corp* (Del Ch 2015) because the aggrieved party in *Prairie Capital* had provided an affirmative acknowledgement that it was only relying on the representations and warranties in the agreement.

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